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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1931.
Docket No. 731.

SAMUEL S. KOENIG, JOHN J. KNEWITZ and
WILLIAM L. WARD,
Petitioners,

against

EDWARD J. FLYNN, Secretary of the State of New York,
Respondent,

and

JAMES A. FARLEY, CHAIRMAN OF THE DEMOCRATIC STATE COMMITTEE,
Intervenor-Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of New York.

HENRY EPSTEIN,
First Assistant Attorney-General, Of counsel.

JOHN GODFREY SAXE,
ROBERT F. WAGNER,
JOHN J. O'CONNOR,
Of counsel.

JOHN J. BENNETT, JR.,
Attorney-General,
State of New York,
Attorney for Respondent.

JOHN GODFREY SAXE,
1 Cedar Street,
New York City,
Attorney for Intervenor-Respondent.

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STATEMENT OF PERTINENT FACTS

Petitioners herein seek to review the determination of the highest court of the State of New York on a question involving the subdivision of the State of New York into districts for the purpose of the election of Representatives to the House of Representatives of the Congress of the United States. The Court of Appeals of the State of New York has determined that such action must be accomplished in the form of statutory enactment and not, as attempted, by concurrent resolution, without gubernatorial sanction; that Chapter 890 of the Laws of 1911 of New York governs, except for two additional Congressmen at large, and that said concurrent resolution is ineffective to repeal said statute.

The Constitution of the State of New York is silent on the manner in which the function of fixing the boundaries of Representative districts for Congressional elections shall be exercised. In this respect, it differs from the constitutions of Minnesota, Utah, Virginia and others containing such provisions. (Virginia Constitution, Section 55; Utah Constitution, Section 1, Article 9; Minnesota Constitution, Article 4, Section 23). The New York Constitution does deal with the manner of the subdivision of the State into districts for its own State legislative bodies. In doing so, the New York State Constitution lays down certain reasonable rules of conduct which govern the said districting (Article III, Sections 4 and 5).

From the beginning of its history up to April 10, 1931, the districting of New York State for Congressional representation has invariably been accomplished by statutory enactment:

Laws of 1789, Chap. 11,
Laws of 1792, Chap. 5,
Laws of 1797, Chap. 62,
Laws of 1801, Chap. 64,
Laws of 1802, Chap. 72,
Laws of 1804, Chap. 19,
Laws of 1808, Chap. 170,
Laws of 1812, Chap. 120,
Laws of 1818, Chap. 126,
Laws of 1821, Chap. 84,
Laws of 1822, Chap. 250,
Revised Statutes, Part I, Chap. II,
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Laws of 1842, Chap. 325,
Laws of 1851, Chap. 499,
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Laws of 1872, Chap. 619, (Passed over Governor's veto),
Laws of 1873, Chap. 798,
Laws of 1883, Chap. 424,
Laws of 1892, Chap. 295,
Laws of 1901, Chap. 591,
Laws of 1902, Chap. 298,
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(Chap. 298, Laws of 1909),
Laws of 1911, Chap. 890,
Laws of 1915, Chap. 340,
Laws of 1917, Chap. 797,
Laws of 1917, Chap. 799,
Laws of 1918, Chap. 34,
Laws of 1918, Chap. 250,
Laws of 1922, Chap. 636.

On April 10, 1931, the Assembly and the Senate of New York State, by concurrent resolution, sought to accomplish the districting of the State into 45 districts for the election of Representatives to the Congress of the United States (Record 12, 37–58). The Attorney-General advised the Secretary of State that this attempted procedure was invalid and that the said districts should not be certified for the purposes indicated therein (Record 67–85).

Petitioners thereupon instituted mandamus proceedings to compel the Secretary of State to carry out the terms and provisions of the concurrent resolution (Record 8–9).

The answer of the Respondent, Secretary of State, set up as a further defense the existence of Chapter 890 of the Laws of 1911, dividing the State into 43 districts for Representatives and the absence of any subsequent statute effecting similar districting or any repeal of the said Chapter 890 of the Laws of 1911 (Record 63).

The answer likewise set up the reasonable provisions which should govern districting for Representatives and which are not contained in the districts set forth in the concurrent resolution; to wit: contiguity, compactness and reasonable equality in enumeration.

The Supreme Court at Special Term, the Appellate Division and the Court of Appeals, have acted with unanimity in denying the petition.

OPINION OF THE COURT OF APPEALS

(Record 128–134)

The opinion of the Court of Appeals may be said to have laid down four clear grounds for declaring the concurrent resolution ineffective:

(1) That the prescription of the boundaries of the districts for the election of Representatives is a function which, when exercised by a legislature, should be exercised by law (Record, 132); that such has been the uniform practice of New York and other States in the constitutional and legislative history of this country; that the distinction is clear cut between the exercise of the legislative function, such as the prescribing of rules of conduct for elections, and the mere expression of consent or dissent as in the ratification of appointments or amendments (Record, 133);

(2) That Chapter 890 of the Laws of 1911 of the State of New York is still effective to accomplish the districting of the State for purposes of the election of Representatives and has not been repealed (Record, 134);

(3) That the Congressional Act of August 8th, 1911, is still applicable insofar as it lays down just and reasonable rules for the districting of states for the election of Representatives, and is still in force as supplementing the provisions of the Act of Congress of June 18th, 1929 (Record, 133);

(4) That the provisions of Sections 3 and 4 of the Act of Congress of August 8, 1911, set up a just and reasonable rule to be followed, which has been recognized by similar enactments over a long period of years, and would be applicable to any districting by a State legislature "even if the statute does not govern *ex proprio vigore*" (Record, 135).

JURISDICTION

The petition for the writ herein is based upon Section 344 of the United States Code Annotated (Section 237 of the Judicial Code as amended). Subdivision b, relating to writs of certiorari, grants jurisdiction to this Court when the validity of a statute of the United States is questioned; or where the validity of a state statute is questioned on the relation of its alleged repugnance to the Federal Constitution or laws.

The only basis, therefore, on which a writ in the instant case may be granted is if a justiciable question is presented which cannot be determined without resort to the Federal Statutes said to be involved and in which the validity of the latter is questioned. No such circumstance is herein presented.

ISSUE PRESENTED BY THE PETITION FOR THE WRIT

The question here presented is: Should the Supreme Court of the United States review a final determination of the Court of Appeals, the court of last resort in New York State, to the effect (1) that the function of prescribing Congressional districts as granted to the state legislatures by Section 4, Article 1 of the Federal Constitution should be exercised by the said state legislatures in the form of a statutory enactment; and (2) that Chapter 890 of the Laws of New York for 1911 has not been repealed by the concurrent resolution.

SUMMARY OF ARGUMENT

The Respondents herein submit to the Court:

That the determination as to the manner of the exercise of the function of Congressional districting provided for by Section 4 of Article 1 of the Constitution of the United States as one to be performed by legislative enactment, has heretofore been conclusively determined by this Court;

That the determination as to what constitutes a legislative function to be performed by statutory enactment is in the highest appellate court of the state or in the state constitution, if there found, and not subject to review by the Supreme Court of the United States;

That Chapter 890 of the Laws of 1911 of the State of New York being still effective, the resolution cannot prevail and the question as to whether or not the said Chapter 890 of the Laws of 1911 of the State of New York is effective is a matter for the highest court of the state to determine; insofar as it does not conflict with the Federal statute, the said determination by the state

court is not subject to review by the Supreme Court of the United States.

By reason of the foregoing, Respondents submit that the petition should be denied.

POINT I

The determination as to the manner of the exercise of the function of Congressional districting provided for by Section 4 of Article I of the Constitution of the United States as one to be performed by legislative enactment has heretofore been conclusively determined by this Court.

The Supreme Court of the United States has conclusively determined that the division of the states into districts for the election of Representatives is a legislative function properly exercised by the enactment of a statute and clearly distinguishable from the function of assent to a resolution or amendment (*Davis* v. *Hildebrandt*, 241 U. S. 565; *Hawke* v. *Smith*, 253 U. S. 221). The distinction herein contended is clearly pointed out by this Court in the *Hawke* case at page 230:

> "The *power to legislate* * * * is derived from the people of the State.
>
> "The *power to ratify* * * * has its source in the Federal Constitution. The *act of ratification* by the State derives its authority from the Federal Constitution to which the State and its people have alike assented."
>
> (Emphasis ours)

The function dealt with in Article 1, Section 4, of the Constitution is further distinguished in lucid language by the Court at page 231:

> "Article 1, Sec. 4, *plainly* gives authority to the State *to legislate* within the limitations

therein named. Such *legislative action* is *entirely different* from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In *such expression, no legislative action* is authorized or required."

(Emphasis ours.)

The uniform practice of the states and the uniform provisions of Congressional acts comprising a course of conduct are of substantial weight in the determination of the proper exercise of similar functions, (*Briscoe* v. *Bank,* 36 U. S. 256, 318; *McPherson* v. *Blacker,* 146 U. S. 1, 36–7; *Stuart* v. *Laird,* 5 U. S. 298, 308).

Whether Congressional districting is such a function as should be subject to the veto power of the governor, when determined by the state court of final resort, is not one which is subject to review by the United States Supreme Court:

Davis v. *Hildebrandt,* 241 U. S. 565; paragraph 1 at p. 567;
Detroit v. *Osburne,* 135 U. S. 492;
Clarborne Co. v. *Brooks,* 111 U. S. 410.

POINT II

The determination as to what constitutes a legislative function to be performed by statutory enactment is in the highest Appellate Court of the State or in the State Constitution, if there found, and not subject to review by the Supreme Court of the United States.

The constitutions of various states contain provisions specifying that the function of districting for Congressional representation shall be performed by law, (Virginia, Section 55; Utah, Ar-

ticle 9, Section 1). Such provisions make legislative enactment mandatory. The word of the state constitution is final. It will not be set aside by the Supreme Court of the United States ~~unless in direct conflict therewith.~~ It is the final word on what constitutes a legislative function for that state.

Minnesota merely vests in the legislature the power to district without further indication of the manner in which it shall be exercised. If Congress, under Article 1, Section 4, has acted by law, obviously the legislature of the state is bound by the regulations laid down by Congress. Hence if the Congressional Act of August, 1911, prevails, the action of the Minnesota legislature as indicated in *Smiley* v. *Holm*, now before this Court, is invalid. The determination of that case, however, does not necessarily involve a like determination of the instant proceeding. The New York Constitution is silent and the highest court of New York has held that irrespective of the applicability of the Congressional Act of 1911, the course of conduct laid down by Sections 3 and 4 of that act prevail and furthermore, there are other governing factors in New York on which the highest court has spoken, irrespective of Congressional limitation, (*Doyle* v. *Hofstader*, 257 N. Y. 244; *Rumsey* v. *People*, 19 N. Y. 41 at 50).

POINT III

Chapter 890 of the Laws of 1911 of the State of New York, being effective and not conflicting with any Act of Congress of the United States, cannot be repealed by concurrent resolution. No reviewable question is therefore presented to this Court.

The law-making power, by the Constitution of the State of New York, is vested in the Senate,

the Assembly and the Governor (*Doyle* v. *Hofstader, Supra,* page 261; Constitution of New York, Article III, Sections 14 and 15). Concurrent resolutions do not have the effect of law in New York, (*People* v. *Palmer,* 12 Misc., 392, affirmed 146 N. Y. 460; *Doyle* v. *Hofstader, supra*). Districting by legislative enactment is a continuous process and one legislative enactment accomplishing districting continues to be operative until a subsequent legislative enactment has superseded it. A law accomplishing districting does not expire or operate to repeal itself by virtue of the tardiness of the legislature in effectually accomplishing a similar purpose by subsequent enactment, (*Rumsey* v. *People,* 19 N. Y. 41 at 50). Chapter 890 of the Laws of 1911 of the State of New York has continued by amendment to be effective to date, (Laws of 1915, Chapter 340; Laws of 1917, Chapters 797–799; Laws of 1918, Chapters 34, 250; Laws of 1922, Chapter 636; *People ex rel. Fitzgerald* v. *Voorhies,* 222 N. Y. 494).

The determination by the Court of Appeals that said Chapter 890 of the Laws of 1911 is still operative for the purpose of accomplishing the election of Representatives by the districts therein set forth is the final determination upon a statutory enactment of the state which in no way conflicts with any Congressional legislative intent and therefore is not reviewable under the provisions of Section 327 of the Judicial Code as amended. There is no repugnance to the Federal Constitution in continuing the effectiveness of Chapter 890 of the Laws of 1911 in the State of New York. The Congressional Act of 1929 relates solely to provision for a ratio of State Member-

ship in the House and contains no provision whatever with regard to prescribing districts within the several States and therefore in no way renders ineffective Chapter 890 of the Laws of 1911 of the State of New York, which the Court of Appeals has held to be in full force and effect.

No discussion is ventured as to the effectiveness of the Act of Congress of August 8th, 1911, inasmuch as the determination of the Court of Appeals has indicated that the provisions thereof, even if ineffective to supplement the Act of 1929, still prevail as a reasonable course of conduct indicated by previous legislative enactment. Irrespective, therefore, of the Congressional Act of 1911, there is no conflict and no validity called in question of a Federal statute by the determination of the New York court which is here sought to be reviewed.

With relation to the latter argument, however, it is well known that repeals by implication will not be favored by this Court. There being no irreconcilable features pointed out between the provisions of Chapter 890 of the Laws of 1911 of the State of New York and the Congressional Acts, whether in force or not, the effectiveness of the State statute will not be upset; (*United States* v. *Greathouse,* 166 U. S. 601 at 605; *Washington* v. *Miller,* 235 U. S. 422 at 428; *Frost* v. *Wenie,* 157 U. S. 46; Cooley, Constitutional Limitations, 5th Edition, 183; *Holden* v. *Minnesota,* 137 U. S. 483 at 491; *Kennedy* v. *United States,* 265 U. S. 344).

There is no limitation of time nor limitation of effectiveness contained in Chapter 890 of the Laws of 1911 of the State of New York. (*Rumsey* v. *People, supra,* p. 13.)

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari be denied. The highest court of the State of New York has determined that the function of districting is one subject to legislative action in the form of law-making; that the provisions of the Act of Congress of 1911 render such action mandatory; that irrespective of the said Act of Congress of 1911, the course of conduct is reasonable and proper and established by precedent; that Chapter 890 of the Laws of 1911 of the State of New York is effective and has not been repealed.

Respectfully submitted,

HENRY EPSTEIN,
First Assistant Attorney-General, Of counsel.

JOHN J. BENNETT, JR.,
Attorney-General,
State of New York,
Attorney for Respondent.

JOHN GODFREY SAXE,
ROBERT F. WAGNER,
JOHN J. O'CONNOR,
Of counsel.

JOHN GODFREY SAXE,
1 Cedar Street,
New York City,
Attorney for Intervenor-Respondent.